

COURT OF APPEALS DECLINES TO BROADEN TORT DUTIES

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Alcombrack v. Ciccarelli

Arizona Court of Appeals, December 3, 2015

A couple defaulted on their home loan obligations on a house they leased to a tenant. The couple did not tell the tenant about the default. After a trustee's sale, the lender hired a company to inspect the house; and the inspection company hired a locksmith company to change the locks. The locksmith company sent a locksmith to change the locks. Mistaking the locksmith for an intruder, the tenant shot and seriously injured the locksmith. The locksmith sued the defaulting couple for negligence, alleging that the couple created an unreasonably dangerous condition by not telling the tenant the house was in foreclosure and that someone might inspect the house and/or change the locks. The trial court granted the couple summary judgment, finding that the couple owed no duty to the locksmith. The locksmith appealed. In a 2-to-1 decision, the court of appeals affirmed that the homeowners owed the locksmith no duty.

The majority reasoned that a landowner not in possession of property owes no duty to a third party who is injured on the property. In addition, the couple did not create a duty to the locksmith by their actions. [Had the foreclosure occurred in 2013 or later, a statute would have obligated the couple to notify the tenant. But it occurred in 2009, the statute did not apply; and the court held the couple had no common law duty.] The majority refused to adopt or apply the Restatement (Third) of Torts § 7, which says "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." One of the reasons for not adopting it was that "adoption of the Third Restatement would do more than just modify existing Arizona negligence law; it would substantially change Arizona's longstanding conceptual approach to negligence law by effectively eliminating duty as one of the required elements of a negligence action." The majority also declined to adopt Restatement Third § 39. The majority quoted this prior Supreme Court language: "We do not understand the law to be that one owes a duty of reasonable care at all times to all people under all circumstances. The common law has not been stretched that far yet, and we envision considerable danger in doing so in this context."

Judge Johnsen dissented. She said, in part, "My view is that under duty principles already established in Arizona, if the Ciccarellis' default authorized the lender to enter the home and change the locks, they owed a duty to take reasonable steps to prevent resulting personal injury to the locksmith the lender sent to do that. Judge Johnsen believed that although there was no "categorical" landlord-lessee relationship giving rise to a duty, nevertheless, the couple created a situation that posed an unreasonable risk of harm to others by defaulting on their loan and empowering the lender to enter the home and change the locks; and thus the couple owed a duty to exercise reasonable care to prevent the risk from taking effect.

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